

head-note to the report of that appeal reads as follows:—

Common intention within the meaning of section 34 implies a pre-arranged plan. To convict the accused of an offence applying section 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.

And in the judgment the following observations appear:—

To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all: if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

In this appeal there was abundant evidence to prove that the three appellants had made a pre-arranged plan and that this plan was duly carried out as pre-arranged. Apart from this, the three appellants were all present when the act was carried out, and there was evidence which the Assessors could have accepted to prove that each appellant took an active part in the murder.

For these reasons the appeal of each appellant was dismissed.

Appeal Dismissed.

PUBLIC PROSECUTOR v. MARIMUTHU S/O AMAYAPAN

[App. Crim. Juris. (Russell, J.) June 14, 1948]
[K.L. — Cr. App. No. 28 of 1948]

Minor Offences Enactment (Cap. 46) S. 35 (i), (ii), (iii), (iv) — Defence — Meaning of "Possession".

In this case an Inspector found in the house of the Respondent a number of articles which might reasonably be suspected of being stolen but at the conclusion of the case for the prosecution the Magistrate acquitted and discharged the Respondent without calling for his defence relying on *Regina v. Kwek Chang Seng*⁽¹⁾ which case was quoted with approval in the case of *Yee Ngok v. Public Prosecutor*⁽²⁾.

Held, that Sub-sec. (iv) of S. 35 of the Minor Offences Enactment was not brought to the notice of the learned Judge in the case of *Yee Ngok v. Public Prosecutor*⁽²⁾. Sub-sec. (iv) of S. 35 definitely states that the word "possession" in sub-sec. (i), (ii) and (iii) includes "possession in a house, building, ship, vessel, boat or other place as well as possession in a public road or place".

Cases referred to:—

- (1) *Regina v. Kwek Chang Seng*, 6 S.S.L.R. p. 35 (Dissented).
- (2) *Yee Ngok v. Public Prosecutor*, (1947) M.L.J. p. 136 (Dissented).

MAGISTRATE'S CRIMINAL APPEAL.

F. G. Cooke, D.P.P., for Public Prosecutor.
Respondent in person.

Russell, J. :— This is an appeal by the Public Prosecutor against a decision of the Magistrate at Kuala Lumpur who acquitted and discharged one Marimuthu s/o Amayapan of an offence punishable under Section 35 (i) of the Minor Offences Enactment (Cap. 46) without calling upon him for his defence.

In the house of the Respondent an Inspector of Police found a number of articles which which might reasonably be suspected of being stolen, and at the conclusion of the case for the prosecution the Magistrate refused to call upon the Respondent for his defence on the ground that a charge under this section can only be maintained if the articles are found in the possession of an accused in a street or public place. He relied upon the case of *Regina v. Kwek Chang Seng*⁽¹⁾ which case was quoted with approval in the case of *Yee Ngok v. Public Prosecutor*⁽²⁾.

The former case was decided before the enactment of the Minor Offences Enactment in its present form, and in my opinion can no longer be relied upon as section 35 (iv) definitely states that the word "possession" in sub-sections (i), (ii) and (iii) includes "possession in a house, building, ship, vessel, boat or other place as well as possession in a public road or place."

I must add that the learned Federal Counsel who appeared for the Appellant in this case pointed out that sub-section (iv) of Section 35 was not brought to the notice of the learned Judge in the case of *Yee Ngok v. Public Prosecutor*⁽²⁾.

I accordingly set aside the order of acquittal and order a new trial before another Magistrate.

Retrial Ordered.

PUBLIC PROSECUTOR v. GINDER SINGH & CHET SINGH.

[App. Crim. Juris. (Callow, J.) June 17, 1948]
[Seremban — Crim. App. No. 8 of 1948]

Motor Vehicles Commercial Use Regulations — Motor Vehicles Commercial Use (Amendment) Regulations 1948, Reg. 7 — Question of mens rea and absolute prohibition against overloading — Responsibility of owner of motor vehicle — Criminal Procedure Code, Ss. 153, 422.

The facts of the case are that on the 6th of February 1948 a lorry driven by one Nagar Singh was found to be overloaded. The driver was proceeded against and very heavily fined. The overloading was the result of directions given by the Manager of an Estate, which in turn resulted from a lorry breakdown. The respondent had no direct connection with the overloading at

all. The Magistrate acquitted and discharged the Respondent following a charge of contravening regulation 6 (now regulation 7) of the Motor Vehicles Commercial Use Regulations. The Public Prosecutor appealed "against the discharge and acquittal of the said Respondent on the ground that the learned Magistrate misdirected himself in holding that *mens rea* on the part of the Respondent was an essential element of the offence".

Held, (a) That there is an absolute prohibition against overloading a motor vehicle which renders the owner of such vehicle liable to conviction despite an apparent absence of *mens rea*. It matters not that the vehicle is overloaded by an employed driver, or even on the direction of a third party or without the knowledge of the owner. The overloading may even be against his express command. If the motor vehicle is found carrying a load in excess of the permitted maximum set out in the haulage permit, then the owner bears the responsibility. (This, of course, does not absolve the driver from liability for any offence he may have committed); (b) That the tender and admission of a certified true copy of the haulage permit is not sufficient. The original permit must be produced; (c) That the record must disclose the plea; (d) That the finding should not be prefaced by the expression "In my opinion". It should be an unequivocal and conclusive act.

Cases referred to :—

- (1) *Public Prosecutor v. Ong Cho Teck*, (1946) M.L.J. 85.
- (2) *Loo Chin Sam alias Lee Chin Han v. Public Prosecutor*, (1948) M.L.J. 109.

MAGISTRATE'S CRIMINAL APPEAL.

Kilner, (D.P.P.) for the Public Prosecutor.

Rintoul for the Respondent.

Callow, J. :— This is an appeal from the Court of the Magistrate, Seremban, against the acquittal and discharge of the respondent on the 23rd of April, 1948, following a charge contravening regulation 6 of the Motor Vehicles Commercial Use Regulations. It will be observed that the case came on for hearing just before the Motor Vehicles Commercial Use (Amendment) Regulations, 1948, came into effect on the 1st of May, 1948, which amendment caused regulation 6 to be re-numbered 7.

The ground of appeal is :—

Your Petitioner is dissatisfied with and appeals against the discharge and acquittal of the said Respondent on the ground that the learned Magistrate misdirected himself in holding that *mens rea* on the part of the Respondent was an essential element of the offence.

On this issue the learned Deputy Public Prosecutor cited the case of the *Public Prosecutor v. Ong Cho Teck*⁽¹⁾, and argued that an absolute duty was imposed upon the owner.

The facts are that on the 6th of February, 1948, a lorry driven by one Nagar Singh was found to be overloaded. The driver was proceeded against and very heavily fined. I have not seen the record of the

proceedings against Nagar Singh, but according to his evidence in this case the overloading was the result of directions given by the Manager of an Estate, which in turn resulted from a lorry breakdown. The respondent had no direct connection with the overloading at all.

I shall refer later to the charge, but condition 4 of the haulage permit referred to in the charge reads :—

The laden weight of the authorised vehicle including the driver and any attendant carried on the vehicle shall not at any time when the vehicle is on the road exceed the maximum permissible laden weight specified in this permit. The load shall be so distributed packed and secured that danger is not caused or likely to be caused to any person on the vehicle or on a road.

Mr. Rintoul for the respondent did not contest the absolute duty or liability of the owner of the vehicle if overloaded. I am quite satisfied that as the law now stands there is an absolute prohibition against overloading, which renders the owners of such motor vehicle liable to conviction despite an apparent absence of *mens rea*. I think owners do not perhaps fully realise this responsibility. It matters not that their vehicles be overloaded by an employed driver, or even on the direction of a third party as in this case; or that the overloading be done without the knowledge of the owner; it may even be against his express commands. If the motor vehicle is found carrying a load in excess of the permitted maximum set out in the haulage permit, then the owner bears the responsibility. His only safeguard is to ensure that his vehicle is in the charge of a responsible person who appreciates the regulations and conditions of transport. If a third party interferes then the owner can only cease in future to do business with that third party; he cannot evade his absolute liability.

I should observe that there are statutory obligations which impose less stringent standards. In such cases the prosecution having proved the event, the defendant may show that he has acted throughout in good faith, and has done everything reasonably possible to prevent the commission of the offence by his servant. If this is accepted the plea of not guilty may prevail, but in the case now under review the prohibition is absolute. If a motor vehicle is overloaded the owner is responsible, and so liable to the penalties set out in (now) regulation 7 of the Motor Vehicles Commercial Use Regulations.

So much for the appeal on the grounds put forward by the Public Prosecutor. The Magistrate was wrong in holding that *mens rea* on the part of the respondent was an essential element of the offence.

But Mr. Rintoul, while very properly conceding the point raised by the appellant, submitted other grounds by which he argued that the decision to acquit should stand, albeit arrived at by wrong premises.

The first point concerns the charge, and quite clearly the charge is wrong. Apart from the omission to state the place of the offence (section 153 of the Criminal Procedure Code), it alleges the carrying of goods weighing 161 cwt. 195 lbs *in excess* of the authorised weight of 135 cwt. Obviously the intention was to charge an excess of some 26 cwt. The poundage defeated me; the petition refers to 195 lbs; the charge to 105 lbs; and Mr. Olver's subtraction (W.P.2) gives 135 lbs. I should state, as regards the charge, that it does not appear to have misled the defendant-respondent, and I think it could be cured by virtue of section 422 of the Criminal Procedure Code.

But the next point is more serious. It has been ruled in this Court in the case of *Loo Chin San alias Lee Chin Han v. the Public Prosecutor*⁽²⁾ that the production of the original haulage permit is essential. It is a ruling subscribed to by the learned Deputy Public Prosecutor, and must be observed. In this case a copy only was tendered and admitted. This copy appears to be certified true by Mr. Olver who describes himself over a rubber stamp as the Commissioner of Road Transport. I do not think this is correct. The original can always be obtained from a defendant on due notice given.

The next point is the designation of the defendant in the Court below. If the haulage permit is in fact a true copy, the original was issued to "Ginder Singh and Chet Singh T/A Seremban Transport Company". In the Court below the charge is against Ginder Singh and Chet Singh as individuals, but according to the evidence of the first witness for the prosecution Chet Singh is dead. Who then should be correctly named as the defendants? The partnership, if one existed, of Ginder Singh and Chet Singh terminated on the demise of the latter. It certainly seems a matter of some doubt, and the Magistrate seems to have acquitted one defendant who for some time has been beyond the jurisdiction. Indeed it would appear that the Court below dealt with the case as only against Ginder Singh, whereas it is at least probable and possible that the real defendant is the Seremban Transport Company. It may be that if so summoned, the same person, Ginder Singh, would appear, but any finding would not be against him personally. On the other hand the haulage permit may be held to have been issued

personally to the two individuals named therein, although I presume that such permits are in constant issue to companies.

There is one other matter which although not raised in the appeal requires mention. It concerns the direction of the lorry to the Police Station by the Assistant Transport Officer (W.P.2). Inquiries from the Road Transport and from the Police failed to discover any authority by which the Assistant Transport Officer may stop and direct traffic. I presume the necessary authority must exist, or a responsible officer such as Mr. Olver would not so act.

Lastly the record discloses no plea, and the finding should not be prefaced by the expression "In my opinion", it is an unequivocal and conclusive act.

The appeal is upheld. The finding of not guilty, acquitted and discharged is set aside. The case is remitted to the Court below with directions that in a charge of contravening regulation 6 (now by amendment regulation 7) of the Motor Vehicles Commercial Use Regulations *mens rea* is not an ingredient; the prohibition and duty are absolute. The case should be re-tried, and consideration given to the amendment of the charge. In proof and procedure observance should be given to this judgment.

Re-trial Ordered.

TAN SHU EN AND ANOTHER v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Federation of Malaya, Bostock-Hill and Briggs, J.J.) September 2, 1948]
[Penang — Criminal Appeal No. 57 of 1947]

Opium and Chandu Proclamation Ss. 3(3) 18, 23 — Possession of Chandu — Knowledge of possession — Whether Customs Officer and Outdoor Officers are Police Officers — Statements to Customs Officer and Outdoor Officers — Confessions — Evidence Ordinance Ss. 17(2), 25 and 26.

This was an appeal from a conviction by the District Judge, Penang, for possession of opium. The appeal was referred to the Court of three Judges. The opium in this case was found in the luggage boot of Motor Car P. 776 which belonged to the second appellant. This first appellant was a brother of the second appellant. The questions raised on appeal were:—

- (a) Was the confession made by the second appellant to Mr. Kandiah a Customs Outdoor Officer admissible in evidence?
- (b) Was the confession made by the second appellant to the Senior Customs Officer admissible in evidence?
- (c) If the answers to questions (a) and (b) are not in the negative, was there sufficient other